IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case Nos. 15-2305 & 15-2478

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), LOCAL 1700

PETITIONER/CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD

RESPONDENT/CROSS-PETITIONER

ON PETITION FOR REVIEW OF DECISION AND ORDER
OF THE NATIONAL LABOR RELATIONS BOARD,
CASE NOS.: 07-CA-081195 and 07-CB-082391

REPLY BRIEF OF PETITIONER/CROSS RESPONDENT UAW, LOCAL 1700

John R. Canzano (P30417)
McKnight, Canzano, Smith, Radtke & Brault, P.C.
423 N. Main Street, Suite 200
Royal Oak, MI 48067
(248) 354-9650 ~ (248) 354-9656
jcanzano@michworkerlaw.com

COUNSEL FOR PETITIONER/CROSS RESPONDENT
UAW LOCAL 1700

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Petitioner/Cross-Respondent Unions, International Union, UAW ("UAW") and UAW Local 1700 ("Union") file this Reply Brief in response to the Brief of Respondent/Cross-Petitioner National Labor Relations Board ("NLRB" or "Board") (Doc 30). For the reasons stated herein and in their initial Brief (Doc 21), Petitioners respectfully request that the Court grant their Petition to Review, and deny enforcement of the NLRB's Order.

ARGUMENT

1. Reply to NLRB's Description of Procedural History.

As an initial matter, the NLRB in its Brief misstates the Board's findings. The NLRB's Brief states that "[w]ith respect to Local 1700, the Board affirmed the Judge's finding that it had not violated Section 8(b)(2), but reversed the Judge and found that Local 1700 had violated Section 8(b)(1)(A) by breaching its statutory duty of fair representation owed to Powell." (Doc 30 at 10). The NLRB neglects to point out, however, that as part of its 8(b)(1)(A) finding, the Board concluded that the Union *did not* violate Section 8(b)(1)(A) by failing to take Powell's grievance to arbitration because the Union reasonably concluded that the grievance lacked merit. As the Board stated:

> The complaint alleges that the Union violated Section 8(b)(1)(A) by refusing "to process to arbitration" Powell's grievance. We find no breach of the duty of fair representation in the Union's failure to take the grievance to arbitration for the reasons the judge stated in his

> decision. The Union negotiated a settlement that was reasonable and consistent with a recent settlement negotiated for another employee. Moreover, a union has substantial latitude to determine whether to process a grievance through to arbitration, *and the facts presented here establish that the Union could reasonably conclude that Powell's grievance did not warrant taking it to arbitration*.

(JA 1155) (Footnote omitted). (Emphasis supplied).

2. Reply to NLRB's Statement of Facts.

The Board spends a considerable portion of its brief discussing factual issues relating to the employer's overtime policies, the non-posting of overtime lists, the Charging Party Aretha Powell's complaints about posting of the overtime lists (which the ALJ properly found to be "perplexing," see ALJD fn. 16 & fn. 18, JA 1161), and the Union's and Employer's decision to post the lists. (NLRB Brief, Doc. 20 at 10-13).[1] However, these facts have little or no relevance at this point, because the Board conclusively found that the Charging Party's concerted activity in complaining about the overtime list posting was not a motivating factor in the Employer's discharge of Powell. (NLRBD, JA 1152).

Instead, as the Board found, Powell was discharged for threatening coworker Belinda Tanner in violation of the Employer's work rules, pursuant to which

[1] Page references to the Union (Doc 21) and Employer (Doc 30) Briefs are to the ECF page numbers. As in the Union's initial Brief, references to "ALJD" and "NLRBD" refer to the ALJ and the NLRB decisions, respectively; and "JA" refers to Joint Appendix page numbers.

threatening an employee is a major offense for which employees are subject to discharge without warning. (NLRBD, 1154; ALJD, JA 1163).

a. **Key Facts Conceded by the Board.**

Notably, in this regard, the Board's Brief not only concedes that the Charging Party made a violent threat against Tanner on May 11, when she told Tanner, "I see I'mma have to tear into your motherfucking ass" (NLRBD, JA 1152; ALJD, JA 1162; NLRB Brief, Doc 30 at 13),[2] but that this threat was the culmination of a recent series of violent acts by Powell and that her violent conduct was escalating. Thus, the NLRB in its Brief agrees that in early May, "Powell said she wanted to fight Faircloth and offered $100 to anyone who would fight her;" and that the day before Powell's threat to Tanner, "Powell got into a fight at work with her former boyfriend Dishon Longmire after she saw him embrace Tanner." (NLRB Brief, Doc 30 at 13).[3] Further, the Board's Brief points out that Powell lied to Union Chairperson

[2] As pointed out by the Union in its Answering Brief to the Exceptions of Counsel for the Acting General Counsel, the Acting General Counsel did not file any exceptions to this finding by the ALJ. (JA 1133).

[3] The Board failed to point out that Powell's threatening conduct continued even after she was fired. In a telephone conversation with Powell when he was trying to convince her to accept the settlement, Union Chairperson LeVaughn Davis explained that other witnesses had submitted written statements against Powell and that "[u]nfortunately they wasn't in your behalf." Powell's response was, "okay, I got something for those motherfuckers." (Davis, JA 829). The Union's failure to disclose that Faircloth was one of the witnesses must be viewed in this light as well as the light of Powell's escalating violent conduct before she was fired.

LeVaughn Davis on May 12 before she was suspended for the May 11 incident, when she replied that she had not spoken to Tanner "in a month" after Davis asked whether Powell had had a recent altercation with Tanner. (*Id*. at 14).

b. The Board's finding, based on the credited testimony of Nate Hudson, that Faircloth was not present when Powell threatened Tanner, is not supported by substantial evidence and is a logical impossibility in that Hudson could not have witnessed that Faircloth was absent when the undisputed threat was made because Hudson was not present when the threat was made.

As explained in the Union's Brief, the NLRB's finding that Faircloth was not present when Powell threatened Tanner on May 11 is not supported by substantial evidence. (Union Brief, Doc 21 at 18 n. 5, and 46-47). The Board's argument to the contrary is without merit. Notably, in the Board's statement of facts, the Board cites Appendix pages 669-670 in support of its contention that Faircloth "was not present during the exchange." (NLRB Brief, Doc 30 at 14). This citation is to the testimony of Nate Hudson where he explains that he *did see* Faircloth in the cage area at the time of the incident and that "she was entering as [he was] leaving." (JA 670). Because the Board overlooked and never tried to explain this critical fact, its finding that Faircloth was not present when Powell threatened Tanner is not supported by substantial evidence.

The Board adopted the ALJ's "credibility determination" based on Hudson's testimony "that Faircloth was not present at the time" of the threat. (NLRBD, JA 1153; ALJD, JA 1163, n. 35). It has been conclusively established that Powell did

make the threat, based on the ALJ's finding, adopted by the Board, crediting the testimony about the incident by Tanner – who placed Faircloth at the scene (JA 937-938) – and discrediting the testimony by Powell – who denied Faircloth was present. (ALJD, JA 1163, n. 34).[4] The ALJ's "credibility determination" regarding Hudson was obviously flawed, because the ALJ credited Hudson for the factual proposition that Faircloth was not present when Powell threatened Tanner, yet Hudson's testimony was that he did not observe that Powell threatened Tanner – an undisputed fact – *while he was in the room*. (JA 667, Hudson testimony that "they never said anything to each other *while I was sitting there*; and JA 679-680, Hudson testimony that he did not know what happened after he left the cage area, that Powell and Tanner were still present when he left, that Faircloth entered as he left, that after he left he witnessed from the outside "a commotion going on" and "saw Ms. Powell leave the locker room upset about something.") In other words, Hudson cannot be relied on to prove that Faircloth was not present when the undisputed threat was made, *because Hudson was not present when the threat was made*.

The NLRB in its Brief simply relied on the unexceptional principle that this court should not overrule the Board's credibility determinations. But this is not

[4] Notably, the ALJ, in crediting Tanner's testimony – and discrediting Powell's – about the threat, cited as support Tanner's testimony at transcript pages 1135-1140 (JA 936-941), which includes Tanner's testimony at transcript pages 1136-1137 (JA 937-938) placing Faircloth at the scene. The ALJ never discredited Tanner's testimony placing Faircloth at the scene.

about credibility. There is no need to discredit Hudson's testimony. But his testimony is limited to what he observed while he was in the room. And he cannot have observed that Faircloth was not present when the undisputed threat was made, because he did not observe the undisputed threat, and thus he could not have been present when the threat was made. The ALJ and the Board simply failed to account for the logical inferences from the credited and undisputed facts. The Board's finding that Faircloth was not present, based on Hudson's testimony and ignoring Tanner's testimony, is not only not supported by substantial evidence, it is a logical impossibility given that Powell undeniably threatened Tanner, yet Hudson could not have been present when that threat occurred if his testimony that he did not witness any threat while he was present is to be believed.

3. Reply to NLRB Argument.

As the Board in its Brief concedes, the NLRB decision finding that the Union breached its duty of fair representation is based on three facts "consider[ed] cumulatively." (NLRB Brief, Doc 30 at 23; NLRBD, JA at 1155-6). The three facts were: (1) that Faircloth submitted a statement against Powell that was partially false in that it represented she had witnessed the threat even though it truthfully described the threat; (2) that Faircloth represented Powell at step 1 of the grievance procedure without disclosing that she had made a statement against her; and (3) that during the grievance process Powell was unaware that Faircloth had submitted a statement

against her. It is readily apparent that the Board's conclusion that the Union breached its duty of fair representation is necessarily premised on the truth of *all three* of these facts "consider[ed] cumulatively" and "taken together." The Board *did not* say that each of these three facts, or any one of them, taken alone, was a separate and independent basis for its conclusion, but just the opposite.

In other words, the Court can only uphold the Board's conclusion if, but only if, it sustains the Board's findings as to each one of these three points. Each one is a necessary link in the chain and a lynchpin of the Board's conclusion that the Union breached its duty of fair representation. As noted above, the first lynchpin – the finding that Faircloth was not present when Powell threatened Tanner – cannot be sustained. Accordingly, the Board's finding that the Union breached its duty of fair representation must be rejected on that basis alone.

a. The Board's mistaken conclusion that Faircloth represented Powell at a step 1 meeting without disclosing her witness statement against Powell, and that Faircloth's limited representation of Powell at step 1 of the grievance process was therefore one factor in the Union's breach of its duty of fair representation, is unsupported by the facts or the law.

As explained in detail in the Union's Brief (Doc. 21 at 39-41), the second lynchpin also cannot be sustained. That is the Board's finding that "Faircloth represented Powell in step 1 of the grievance procedure, without disclosing that she had submitted a statement against Powell. . ." (NLRBD, JA 1155), adopting the ALJ's finding that "Faircloth represented Powel at the step 1 *meeting* . . ." (ALJD,

JA 1163) (emphasis supplied). In its Brief (Doc. 30 at 28) the Board takes issue with the Union's contention that the Board and ALJ were mistaken, in that there is never a meeting at step 1 and there was no step 1 meeting in this instance, and that the ALJ and Board confused the May 12 pre-grievance meeting, at which Powell was suspended, with step 1 of the grievance procedure.

It is readily apparent that the Board confused and conflated the May 12 meeting with May 18, when Faircloth simply delivered the grievance pursuant to the parties' normal, routine procedure.[5] First, it is implicit in the Board's finding that Faircloth represented Powell at step 1 without disclosing to Powell that she had given a statement against her, that there was a meeting where Powell and Faircloth were together at which Faircloth could have made the disclosure to Powell. While Powell and Faircloth were both present at the pre-grievance meeting (along with Davis and Walle) on May 12, Powell was not present on May 18 when Faircloth delivered the grievance. Second, the ALJ's finding, which the Board adopted, refers to a "step 1 meeting." (AJLD, JA 1163). The ALJ's citation to the record include a citation to Tr. 1125 (*id*. n. 45) where Faircloth answers "yes" when asked "You never made an argument on her behalf, isn't that true?" (Tr. 1125, JA 927). But this is a

[5] As noted, step 1 of the grievance begins and ends with delivery of the grievance. It is undisputed that there is never any discussion at step 1 of the grievance procedure (Walle, JA 287) and that grievances are never resolved at step 1 but always move on to step 2. (Davis, JA 792). In short, there was never any step 1 "meeting."

continuation of Faircloth's testimony from the previous page, in which it is clear she is referring to the May 12 meeting at which "Vaughn" (LeVaughn Davis) and Powell were present:

> Q. Isn't it true you represented Ms. Powell at the first step of the grievance procedure?
>
> A. I was in the office, and I signed her paper. Vaughn left with Ms. Powell and spoke to Ms. Powell.

(Tr. 1124, JA 926)

In short, Faircloth was confused (and mistaken) about the step 1 "meeting," as was the ALJ who cited this testimony in support of his finding, as was the Board, which adopted the ALJ's finding.

More importantly, there is simply no evidence that, in writing the grievance and delivering it to the employer on May 18, Faircloth did anything less or anything different than she or any other Union representative would have otherwise done had she not been a witness or provided a witness statement against Powell. In other words, the Board's conclusion overlooks the fact that Faircloth's submission of a witness statement against Powell had no bearing on her actions in processing Powell's grievance. The fact that Faircloth had given a statement against Powell *simply made no difference in how she processed the grievance*, given Faircloth's limited and ministerial role in the grievance procedure. There is no evidence, and no claim, that the grievance itself was in any way improper. The grievance was

timely, it alleged "unjust termination" of Powell by the employer, and it sought as relief "for Aretha to be reinstated to her position." Faircloth handled this grievance just like any other termination grievance. (Grievance, JA 120; Faircloth, JA 906-908; Walle, JA 283-284, 287; Davis, JA 793-794).

The Board's conclusion that it was "especially significant" that Faircloth represented Powell at step 1 of the grievance procedure can only mean that if someone else – someone who had not submitted a statement against Powell – had written and delivered the grievance, that person's conduct in handling the grievance would not have been a factor in the Board's consideration of whether the Union breached its duty of fair representation. But since there is no evidence that Faircloth's conduct was any different than that of any other such person, the Board's finding that Faircloth's conduct *was* a factor in the Union's breach of its duty of fair representation cannot be sustained on the facts or the law. It is not supported by substantial, or any, evidence, and there is nothing about Faircloth's routine, normal role in writing and delivering the grievance that could be considered unfair representation under controlling law.[6]

[6] The cases cited by the Board in its Brief at 25-26 are inapposite. In *Roadway Express*, 355 NLRB 197 (2010), enf'd, 427 F. App'x 838 (6th Cir 2011), the Union agent deliberately botched a discharge arbitration (including giving deliberately false testimony) over a meritorious grievance of a political opponent. In *Local 1640, AFSCME (Children's Home of Detroit)* 344 NLRB 441 (2005), enf'd mem. 2006 WL 2519732 (6th Cir. 2006), the union failed to process a meritorious grievance. Not only did the union offer no explanation for its failure to do so, political opponents of

Again, this factor was one of three which the Board "considered cumulatively" and "taken together" in concluding that the Union breached its duty of fair representation. Each factor is a lynchpin without which the Board's unfair representation finding cannot be sustained. Since the Board's finding as to this second factor cannot be sustained, neither can the Board's conclusion that the Union breached its duty of fair representation.

b. The Union's Remaining Challenges are Properly Before the Court.

---

the grievant responsible for processing the grievance lied to her about the status of the grievance. In *Pacific Intermountain Express*, 215 NLRB 588, 598 (1974), the union representative handling a discharge grievance deliberately and with the intent to deceive concealed material facts about a key document not only from the grievant but from the grievance committee responsible for deciding whether to grant or advance the grievance to arbitration, and as a result the grievant was denied what would otherwise have been "a strong case for arbitration." And in *Teamsters Local 896 (Anheuser Busch)*, 280 NLRB 565, 575-76 (1986), the union not only failed to inform the grievant of key changes to the contract regarding scheduling which, because she was unaware of the new rules, led to her discharge, but the union also deliberately altered a document sent to the grievant with the intent to mislead her, and continued to deliberately mislead the grievant at her arbitration with the intent (and result) of undermining the grievant's presentation of her defense.

In the present case, not only is there no evidence that the failure to disclose Faircloth's witness statement to Powell was deliberate or intended to mislead her, there is no evidence *at all* as to why the statement was not disclosed. Accordingly, there is simply no basis for any finding that not disclosing the statement was arbitrary or in bad faith. Moreover, unlike the above cases, here the grievant has been conclusively and admittedly determined to be guilty of the offense for which she was discharged, the grievant knew she was guilty, and the union has been conclusively found to have properly declined to arbitrate the grievance for lack of merit. The cases cited by the Board lend no support to the erroneous – and unprecedented – decision in this case that the union breached its duty of fair representation.

The Board argues that the Union's remaining challenges are not properly before the Court because they were not raised below, citing NLRA Section 10(e), 29 U.S.C. § 160(e). The Board is wrong. The Board claims the following remaining issues are precluded: (1) that the Union's failure to disclose Faircloth's statement is immaterial because (as the Board found) the Union properly concluded that the grievance lacked merit and properly declined to arbitrate the grievance (Union Brief, Doc 21 at 27-28); and (2) that the Board improperly imposed a duty on unions that is incompatible with and contrary to established duty of fair representation law. (*Id*. at 38-45).[7]

Contrary to the Board's contention, these issues were adequately raised before the Board. The Union at trial and in its Response to the Board's Exceptions (JA 1095-1138) argued, as to the law, the proper scope and reach of the duty of fair representation, and as to the facts, that the Union's conduct did not amount to a

[7] The Board also claims that the Union is precluded from arguing a third issue here, that the Board erred in not finding that the alleged breach more than likely affected the outcome of the grievance procedure, contrary to established Sixth Circuit duty of fair representation law. See *Garrison v Cassens Transport Co.*, 334 F.3d 528, 539 (6th Cir. 2003). (Union Brief, Doc. 21 at 44-46.) The Union does not agree that this issue is not properly before the Court, because it is part and parcel of the argument asserted to the Board by the Union that the Acting General Counsel failed to establish, under controlling duty of fair representation law, facts showing that the Union was liable for breach of the duty. However, as the Board notes, the issue raised by the Union is based on hybrid Section 301/duty of fair representation case law, and at the NLRB the analogous issues are normally litigated at the compliance stage. See, *Iron Workers Local Union 377 (Alamillo Steel Corp.*), 326 NLRB 375 (1988). Accordingly, the Union will decline to address the merits of that issue here.

breach of that duty as properly understood. For example, the Union argued that it considered the merits of the grievance and all the surrounding facts and circumstances, and reasonably declined to advance the grievance to arbitration. (JA 1111). The union extensively argued the pertinent legal principles and case law governing a union's duty of fair representation, including that the duty requires a union to "serve the interests of all members . . . ," citing *Vaca v. Sipes*, 336 U.S. 171, 190 (1967); that a union breaches its duty only if "the union's behavior is so far outside 'a wide range of reasonableness' as to be *irrational*," citing *Airline Pilots v. O'Neill*, 499 U.S. 65, 67 (1991), quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953); that a union is not required to act with maximum skill or adeptness, to exercise every possible option, or to advocate a grievant's case in a perfect manner, citing, *inter alia*, *Local 355 Teamsters* (*Monarch Institutional Foods*), 229 NLRB 1319, 1321, (1997); that something more than mere negligence, poor judgment or ineptitude in grievance handling must be established to find a breach of the duty, citing, *inter alia*, *United Steelworkers of America v. Rawson*, 495 U.S. 362 (1990), and *Local 195 Plumbers (Stone & Webster)*, 240 NLRB 504, 507-508 (1979); that in exercising its broad discretion, a union is not required to advocate the grievant's position but may settle the grievance on terms different than sought by the employee or agree with the employer regarding the merits of the grievance and refuse to further advance the grievance, citing *Vaca*, 386 U.S. at 191, and *Hotel and Restaurant*

Employees Local 64 (HLJ Management), 278 NLRB 773 (1986); that a union representative in handling grievances is not held to the same standards as an attorney, citing *inter alia*, *Local 372 Teamsters* (*Kroger Co*.), 233 NLRB 1213, 1217 (1997); and that in evaluating the merits of grievances, a union's discretion allows it to account for the conflicting interests of the employee it represents, citing *Humphrey v. Moore*, 375 U.S. 335, 349-350 (1969). (JA 1117-1119).

Further, the Union argued as to the facts (and the lack of facts) that there was no competent evidence that the Union acted arbitrarily or in bad faith at steps 1 or 2; that Faircloth acted properly in handling Powell's grievance at step 1 and followed the grievance process just as she customarily did; that there was no irregularity as to step 1 of the grievance procedure; and no evidence that Faircloth mishandled, botched or sabotaged the grievance. (JA 1119).

Finally, the Union argued that under the circumstances of this case its failure to disclose Faircloth's witness statement to Powell did not amount to a breach of the duty of fair representation. The Union discussed and distinguished a number of cases which the Acting General Counsel cited for the proposition that the Union breached its duty by failing to disclose the witness statement. In particular, the Union argued that in contrast to the cited cases, in this case disclosure of the statement would not have helped Powell by providing her a defense, or otherwise, because Powell's statement – discredited by the ALJ (and subsequently also by the

Board) – denying that she threatened Tanner, was false, because the Union had no duty to advance the grievance to arbitration because Powell was guilty of threatening Tanner, and because Powell rejected a reasonable settlement despite the fact that her statement was false. (JA 1120-1126).

The Court should reject the Board's reliance on a hypertechnical and legally unsound interpretation of Section 10(e) as an unwarranted attempt to avoid the merits. The Board was adequately apprised that the Union considered its failure to disclose the witness statement to be immaterial, because the Union had reasonably (and correctly) concluded the grievance lacked merit. And the Board was adequately apprised that the Union contended that to establish a breach of the duty of fair representation, more than a showing of simple negligence, poor judgment or ineptitude is required, that the law does not impose upon unions the duty to act like lawyers, and that in exercising its discretion in grienvace processing a union can and should consider the interest of the entire bargaining unit, and not just the grievant's interest.

Section 10(e) does not require that an issue be raised before the Board with exact precision, as the Board contends. Section 10(e) requires no more notice to the Board than has been provided here, as a number of this Court's cases reflect.

For example, in *NLRB v. United States Postal Service*, 833 F. 2d 1195 (6th Cir. 1987) this Court rejected a claim by the NLRB that the Court was precluded from

reviewing an issue involving the Postal Reorganization Act ("PRA") because the respondents had not filed exceptions or cross exceptions to the Board specifically raising the issue. The Court held that it was sufficient that the Board "necessarily took into consideration" the issue based on the record before the ALJ. 833 F.2d at 1202. The Court noted that it was not precluded from reviewing "two legal theories to support the same issue" as opposed to two separate issues, only one of which was argued to the Board. The Court held that it was sufficient that the issue had been disputed before the Board, whether or not specifically raised:

> This Court is not being asked to consider a separate issue that was never urged upon the Board. Rather, *we are being asked to review the Board's ruling that a particular practice is illegal, a ruling that was vigorously disputed by the parties before the Board. We hold that the practice is not illegal, and in doing so we necessarily consider the applicable law*.

Id.

Similarly, in *NLRB v. Watson-Rummell Electric Company*, 815 F.2d 29 (6th Cir. 1987), the Court held it was not precluded from reviewing an employer's claim that it was not required to honor the terms of an expired collective bargaining agreement because of its special status as a construction industry employer under Section 8(f) of the NLRA, despite the fact that the employer had raised the 8(f) issue, specifically, for the first time in the Court of Appeals. The Court held it could review the issue because the employer's arguments to the Board were sufficient to have put

the Board on notice that the issue was applicable even though the employer did not specifically assert 8(f), as such:

> We reject the Board's contention that Watson-Rummell has waived any claim to § 8(f) status because of a failure to invoke its protection specifically below. The specificity required for a claim to escape the ban imposed by § 10(e) is that which will "apprise the Board of an intention to bring up the question." *May Stores v. NLRB*, 326 U.S., 376, 386-87 n. 5, 66 S.Ct. 203, 209 n 5. 90 L.Ed. 145 (1945). A general objection combined with special circumstances may be sufficient to constitute notice. *Id*.
>
> In this case, the Board should have considered the applicability of § 8(f) to Watson-Rummell. The ALJ found that Watson-Rummell was "an electrical contractor in the construction industry." Joint Appendix at 135. Watson-Rummell consistently asserted that it was under no duty whatsoever to honor the contract beyond May 31, 1981. Furthermore, the testimony offered before the Board regarding Watson-Rummell's operations suggests strongly that it is a § 8(f) employer, and this testimony should have prompted the Board to inquire further into the applicability of the special exemption.

815 F.2d at 31.

In *NLRB v. Triec, Inc.*, 946 F. 2d 895, 138 LRRM (BNA) 2696 (6th Cir. 1991) (unpublished), this Court reviewed an NLRB order finding the employer had committed numerous unfair labor practices in violation of Section 8(a)(1) of the NLRA, one violation of 8(a)(5), and imposing a bargaining order. At the Court of Appeals, the employer raised the issues: (1) whether there was substantial evidence to support the Board's finding that the employer unlawfully promised and/or granted benefits in order to undermine union support; (2) whether there was substantial evidence to support the Board's finding that the employer coercively interrogated

certain employees; (3) whether there was substantial evidence to support the Board's finding that the employer unlawfully threatened and intimidated employees at certain company meetings; and (4) whether a bargaining order was appropriate even if all the unfair labor practices were affirmed. The Board on appeal argued that the employer was barred by Section 10(e) from asserting issues 1-3 for failure to specifically raise the issues before the Board. In its exceptions to the Board, the employer had simply stated the following:

> Specifically, the Employer excepts to the order to bargain with the Union because such remedy is extraordinary and should be ordered only when the Employer's conduct is so egregious that ordinary remedies are futile. The Judge drew inferences from often conflicting testimony which were unfairly made and were misapplied to the situation at hand.

946 F.2d 895, * 6. The Court held that although the employer had asserted the issues "ineptly," the exception as to the disputed issues "was implied" and sufficient to preserve the issues for review, especially because the Board did consider the issues on the merits. As the Court explained:

> While the last sentence does not state as clearly as is possible its exception to the ALJ's evaluation of the evidence concerning unlawful promises of benefits, coercive interrogation, and threats of reprisal against the employees, we hold that the exception is implied. Furthermore, the Board in its review of the ALJ's decision acknowledged the respondent's exceptions to "certain credibility findings" by the ALJ and wrote, "[w]e have carefully examined the record and find no basis for reversing the finding."
>
> The legislative purpose behind section 10(e) was to provide the Board the opportunity to consider, on the merits, the questions to be urged in

> a review of its order by an appellate court. (Citations omitted.) In this case, the Board did consider on the merits the issues now brought before this court, thus satisfying the purpose of section 10(e) and thereby preserving those issues for appeal.

See also, *May Dept. Stores v. NLRB*, 326 U.S. 376, 386 n.5 (1945) (Section 10(e) did not preclude the Court from considering employer's objection that portion of remedial order was overbroad and required employer to generally cease and desist from conduct beyond specific violations found by Board, where the only objection employer asserted below was that contested language was "not supported or justified by the record." ". . . Although it falls short of desirable specificity, we think the objection was sufficient in the present case. . . . [The] circumstances coupled with an objection that the order was 'not supported or justified by the record' put the Board on notice of the issue now presented."); see also, *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 943 (6th Cir. 1986) (rejecting Board's claim that Section 10(e) precluded Court from considering claim that respondent's discharge in bankruptcy barred enforcement of Board's order when respondent did not present this issue to the Board. Court held that issue was presented, "in effect," when respondent filed in proceedings below a "plea in abatement due to bankruptcy.")

That the contested issues were sufficiently presented to, and necessarily considered by, the Board is further apparent here because the Board found that issues related to the failure to disclose the witness statement were "fully litigated" by the parties and "closely related" to the complaint allegations – even though the

complaint did not allege the Union's failure to disclose the witness statement, or that Faircloth's representation of Powell at step 1 of the grievance procedure, was a violation or an element of a violation of the Union's duty of fair representation. (NLRBD, JA 1178, n. 13). Thus, the Board was adequately apprised that the Union was raising issues concerning the scope of the Union's duty of fair representation in connection with the failure to disclose, including whether the nondisclosure was material given that the Board had also found that the Union lawfully declined to pursue the grievance to arbitration, and whether a breach of the duty could be established without any showing as to the reason for the nondisclosure, i.e., without any showing that the reason for the nondisclosure was the result of something more than mere negligence or ineptitude.

The Board cannot have it both ways. If the issues were not "fully litigated" and "closely related" to the Complaint allegations, the Board's unfair labor practice finding would have been not only improper, but a due process violation. See, *Pergament United Sales*, 296 NLRB 333 (1989), enf'd 920 F.2d 130 (2d Cir. 1990). If they were "fully litigated" as the Board said they were, then they were obviously presented to and considered by the Board, and can be considered by this Court.

c. The Failure to Disclose the Witness Statement to Powell is immaterial because the Union properly concluded that the grievance was without merit and, as the Board concedes, Powell was guilty as charged.

The Board in its Brief mischaracterized the Union's argument, stating there is "no support for the proposition that, once it files a grievance, a union's breach of its duty arising from its processing of a grievance subsequently is excused if the grievance is found to be meritless." (Doc. 30 at 32). That is not the Union's argument. The Union did not concede, even in the alternative, that it breached its duty of fair representation by not disclosing the witness statement to Powell. (See Union Brief, Doc 21 at 37-38). The Union is arguing that not disclosing the witness statement did not matter because the grievance lacked merit. It is conclusively established and admitted by the Board in its Brief (Doc. 30 at 13) that Powell threatened Tanner on May 11, telling Tanner "I see I'mma have to tear off into your motherfucking ass." This threat violated the Employer's Group 1 work rules which prohibit "[t]hreatening, intimidating, or coercing employees . . ." (Termination Notice, GC 9, JA 117). And a "violation of Group 1 work rules will result in employee discharge without warning" under the CBA. (CBA, progressive discipline section, JA 90).

This threat was the culmination of a course of escalating violent conduct by Tanner, including Powell's bounty offer earlier in the month of $100 to anyone who would fight Faircloth, and Powell's physical attack on her ex-boyfriend the day before because Powell had seen him embracing Tanner. The Board also admits Powell was guilty of these acts of violence. (NLRB Brief, Doc. 30 at 13). And the

Board in its decision found that the Union's decision not to arbitrate the grievance was reasonable and did not breach the Union's duty of fair representation. (NLRBD, JA 1155). In this light and given the Board's conclusive findings and admissions, its suggestion that the grievance did have merit (NLRB Brief, Doc. 30 at 32) cannot be taken seriously and must be rejected.

Given that the grievance lacked merit and that the Union reasonably determined it lacked merit, as explained in the Union's original Brief (Doc 21 at 37-38), the Union had no duty to file a grievance in the first place. And, having filed the grievance, the Union properly determined not to arbitrate the grievance, as the Board found. Thus, the Union could have simply withdrawn the grievance without settling it. See, e.g., *Douglas Aircraft Co.*, 307 NLRB 536, 557 (1992). In either case, disclosing the witness statement to Powell would not matter.

The failure to disclose the witness statement is immaterial for another reason as well. Because there is no question that Powell was guilty, obviously Powell knew she was guilty. Powell knew that Tanner had made a statement against her, and Davis also advised her there were statements by coworkers against her. (ALJD, JA 972; Powell JA 377, 388, 448; Davis, JA 829). Thus, disclosing one more witness confirming that Powell was guilty, when she already knew she was guilty, could not have possibly affected her assessment of the situation.

Finally, as noted in the Union's Brief (Doc. 21 at 42-44) the Board's conclusion that had Powell known of Faircloth's statement, "it could have affected her evaluation of the settlement offer and her assessment of whether the Union was likely to pursue her grievance to arbitration in the absence of a settlement" (NLRBD, JA 1155), is not supported by substantial, or any, evidence and is pure speculation.[8] The Board concedes it made no factual findings on this point. (NLRB Brief, Doc. 30 at 34), further supporting the Union's position that the failure to disclose Faircloth's statement is immaterial.

d. The Board does not contest that there is no evidence as to why the Union did not disclose Faircloth's statement. Accordingly the Board's decision that the Union breached its duty of fair representation cannot be sustained because it is based on a strict liability theory

The Union in its Brief pointed out that the Board's theory of liability in this case, which essentially imposed on Faircloth a duty to act as a criminal defense attorney whose only obligation is to her "client," is at odds with established principles of fair representation law, which requires unions to honor the rights of ***all*** bargaining unit members. (Union Brief, Doc. 21 at 48-55). In cases of workplace violence such as this, a Union's duty of fair representation includes the duty to protect other employees from violent aggressors like Powell. The Union also

[8] The Board does not contend that this is one of the issues the Court is precluded from considering. (NLRB Brief, Doc. 30 at 29).

pointed out that while there were many possible reasons why the Union did not disclose Faircloth's statement, or the fact that she gave a statement, to Powell, the record contains *no evidence* as to why the Union did not do so – whether because of fear of retaliation, simple negligence or ineptitude, or any other reason. The Board's Brief in response to this argument points to no such evidence. (NLRB Brief, Doc. 30 at 34).

There is accordingly no evidence, and certainly no substantial evidence, that could show that the nondisclosure was "wholly arbitrary" or "intentionally misleading." The Board had the burden of proof on this issue. In short, despite the Board's hollow denial that its decision imposes strict liability on the Union (*id*.), that is precisely the outcome here if the Board's decision is left undisturbed. Because a breach of the duty of fair representation cannot be premised on a strict liability theory, the Court should vacate and refuse to enforce the Board's decision.

CONCLUSION

For the reasons stated, the Union respectfully requests that the Court grant its Petition for Review and refuse to enforce the Board's decision.

McKNIGHT, CANZANO, SMITH,
RADTKE & BRAULT, P.C.

/s/ John R. Canzano
JOHN R. CANZANO

Dated: July 22, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C), the undersigned certifies this brief complies with the type-volume limitations of FRAP 32(a)(7)(B)(I).

1. Exclusive of the exempted portions in FRAP 32 (a)(7)(B)(iii), the brief contains 6555 words.

2. The Brief has been prepared in proportional spaced typeface using 14-point Times New Roman, Microsoft WORD 2013.

3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in FRAP 32(a)(7), may result in the Court striking the brief and imposing sanctions against the person signing the brief.

/s/ John R. Canzano
JOHN R. CANZANO

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2016, I electronically filed the foregoing document with the Clerk of the Court using the ECF System, which will send notification of such filing to all parties.

By: /s/ John R. Canzano
JOHN R. CANZANO (P30417)
Attorneys for Petitioner/Cross-Respondent
423 N. Main Street, Suite 200
Royal Oak, MI 48067
(248) 354-9650
jcanzano@michworkerlaw.com

Dated: July 22, 2016